U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 172
July - August 2004

John M. Vittone
Chief Judge

A.A. Simpson, Jr.
Associate Chief Judge for Longshore

Thomas M. Burke
Associate Chief Judge for Black Lung

I. Longshore

ANNOUNCEMENTS

Calculation of Interest

In 1984 the Benefits Review Board adopted the Treasury Bill yield immediately prior to the date of judgment (date the decision and order is filed at OWCP; *cf. Nealon v. California Stevedore & Ballast Co.*, 996 F.2d 966 (**9th Cir.** 1993)(Comp order is deemed filed in **Ninth Circuit** when the parties received the order.)). *Grant v. Portland Stevedoring Co.,* 16 BRBS 267 (1984), *recon'd* 17 BRBS 20 (1985). Upon reconsideration of *Grant* in 1985 the Board clarified the method used to calculate interest rates pursuant to 28 U.S.C. § Section 1961. *Grant v. Portland Stevedoring Co.*, 17 BRBS 20 (1985). This meant that when interest was awarded, the rate had to reflect the rate on the 52-week U.S. Treasury Bill yield immediately prior to the date of judgment. However, the last auction of 52 week Treasury bills was on February 27, 2001. OWCP is currently using the weekly average one year constant maturity Treasury yield as published by the Federal Reserve System for the week preceding the date of judgment.

Accordingly Decisions and Orders in longshore cases are no longer referencing that rate in awards of interest. Likewise, the reference to such rates in connection with settlements in 20 C.F.R. 702.243(g) is no longer applicable. Interest calculations now are the same as that used by the United States District Courts in money judgments in civil cases—which is based on the weekly average 1-year constant maturity Treasury yield for the calendar week preceding the date of the order awarding benefits (In LHC cases, this will be the date of service by the District Director).

Additional information on interest rates may be found at DOL's web site: http://www.dol.gov/esa/owcp/dlhwc/lsinterest.htm.

[Topic 65.8.3 Interest—Applicable Rate of Interest]

Rise in Workers' Compensation Benefits

BNA reports that "workers' compensation benefits rose in 2002 at the fastest pace in a decade, reaching $53.4 billion, largely due to higher spending on medical care."

***[ED. Note**: The following announcements by federal agencies may eventually affect the administration of the LHWCA on issues of suitable alternate employment and Section 8(f).]*

Study of Hearing-Impaired Employees

The National Institute for Occupational Safety and Health (NIOSH) plans to study methods of accommodation for hearing-impaired workers. The proposed study will look at an evaluation and intervention protocol used to accommodate noise exposed, hearing-impaired workers so they can continue to perform their jobs without further hearing loss. Results from the proposed study will be used to make recommendations to hearing health professionals and hearing conservation program managers on the auditory management of hearing-impaired workers. (69 Fed. Reg. 44537). Comments on the study were due within 30 days of the request's publication and can be sent to CDC Desk Officer, Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, D.C., 20503.

Obesity

While not directly calling obesity a disease, Medicare has nevertheless adopted a new policy by abandoning its previous position that "obesity itself cannot be considered an illness." The new policy will not have an immediate impact on Medicare coverage and does not affect existing coverage of treatments of diseases resulting in or made worse by obesity. However, as requests for coverage of obesity treatments are made by the public, Medicare will review the scientific evidence about their effectiveness.

Riverboat Casino Law

For a thorough discussion of riverboat casino law, *see* "Riverbost Casinos and Admiralty and Maritime Law: Place Your Bets!," 28 Tul. Mar. L. Journ. 315 (Summer 2004).

[Topic 1.4.3.1 Floating Dockside Casinos]

A. Circuit Courts of Appeals

P & O Ports Louisiana, Inc. v. Newton, (Dismissal of Petition for Review)(No. 04-60403)(**5th Cir.** July 30, 2004).

The **Fifth Circuit** dismissed the employer's motion for lack of jurisdiction. Previously, while the matter was before OWCP the claimant had filed a Motion to Compel Discovery, seeking enforcement of an OALJ subpoena pursuant to *Maine v. Bray-Hamilton Stevedore Co.*, 18 BRBS 129 (1986). The claimant had sought to discover information about potential employers identified by P & O's vocational expert regarding suitable alternate employment. P & O filed a Motion to Quash Subpoena Ducem Tucem and a Motion for Protective Order. The ALJ denied P & O's motions, finding that its vocational evidence is discoverable, relevant and not privileged. P & O appealed to the Board and the claimant moved to dismiss the employer's appeal. The Board recognized that the employer was appealing a non-final order of an ALJ and noted that it "generally declines to review interlocutory discovery orders, as they fail to meet the third prong of the collateral order doctrine, that is, the discovery order is reviewable when a final decision is issued." The Board further found that the case did not involve due process considerations, that the employer did not contend the documents were privileged, and that the employer would not suffer undue hardship by complying with the ALJ's subpoena since the evidence was already in existence. Thus the Board dismissed the employer's appeal. The employer then petitioned the **Fifth Circuit**.

[Topics 19.3.6.2 Procedure—Discovery; 27.2 Powers of ALJs--Discovery]

Newport News Shipbuilding & Dry Dock Co. v. Brown, ___ F.3d ____ (03-1480)(**4th Cir.** July 19, 2004).

An award under Section 14(f) for an employer's late payment of compensation is a successful prosecution of a claim for compensation for purposes of awarding attorney fees. The **Fourth Circuit** reasoned that the amount due for late payment satisfies the definition of "compensation" because it is a "money allowance payable" to the employee who is due the basic compensation award. "[W]hen the language of Sec. 14(f) is read together with the LHWCA's definition of compensation, and the Act's structural distinction between compensation and penalties is taken into account, it is plain that an award for late payment under Sec. 14(f) is compensation."

[Topics 14.4 Compensation Paid Under Award; 28.1.1 Attorney Fees—Generally]

Newport News Shipbuilding & Dry Dock Co. v. Harris-Smallwood, (Unpublished)(No. 02-1590) (**4th Cir** July 12, 2004).

In this unpublished matter involving Sections 12 and 13, the **Fourth Circuit** provides a good discussion dealing with crediting testimony of witnesses and weighing contradictory evidence and Section 8(f).

[Topics 23.1 Evidence; 23.6 ALJ Determines Credibility of Witness; 24.1 Witnesses—Generally; 8.7.1Special Fund Relief—Applicability and Purpose of Section 8(f)]

Brown v. Thompson, ___ F.3d ___ (03-1588)(**4th Cir.** July 7, 2004).

In this non-LHWCA case, the **Fourth Circuit** held that Medicare was entitled to reimbursement from proceeds of a $285,000 settlement reached in a malpractice suit. Brown had relied on the "prompt payment" exception in MSP, but the court held that the Medical Modernization Act of '93 (MMA) provides otherwise. The court noted that the MMA provisions were clarifications and not substantive changes in the law.

[Topic 8.10.5 Section 8(i) Settlements--Approval]

Martin v. Boyd Gaming Corp., ___ F.3d ___ (03-30459)(**5th Cir.** July 8, 2004).

A floating casino securely moored during gaming activity served no transportation function and was therefore, not a vessel. Thus a plaintiff employed on the floating casino could not be a Jones Act seaman. The floating casino in question had been designed and constructed as a vessel, and built as a replica of a 19th Century paddle-wheel steamer, carried a valid certificate of inspection from the U.S. Coast Guard and had been required by the Louisiana Legislature to conduct gaming cruises until 2001, after which it was allowed to stay dockside for gaming and only moved twice a year so that its mooring area could be dredged. The plaintiff, employed as a cocktail waitress, slipped and fell and sued under the Jones Act. The **Fifth Circuit** held that once the floating casino was withdrawn from navigation so that transporting passengers, cargo or equipment on navigable water was no longer an important part of the business in which the craft was engaged, the craft was not a vessel.

[Topics 1.4.2 Master/member of the Crew (seaman); 1.4.3 Vessel; 1.4.3.1 Floating Dockside Casinos]

Campbell v. Lake Charles Stevedores, Inc., (Unpublished)(No. 03-60690)(**5th Cir.** July 15, 2004).

In an unpublished opinion the **Fifth Circuit** upheld the ALJ's "extensive, comprehensive and well-reasoned" decision which determined that the Section 20(a) presumption had been rebutted and that the evidence as a whole supported the conclusion that the claimant's ailment was pre-existing and not exacerbated by his work-related trauma, and thus, was not work related. (Claimant had epidural lipomatosis.)

[Topics 20.3 Section 20(a) Presumption—Employer Has Burden of Rebuttal With Substantial Evidence; 20.3.2 Successful Rebuttal]

Cunningham v. Bath Iron Works, ___ F.3d ___ (No. 03-1980)(**1st Cir.** August 3, 2004).

In this situs case, the **First Circuit** upheld the ALJ's finding of no coverage where a pipe fitter worked for Bath Iron Works (BIW) at the company's East Brunswick Manufacturing Facility (EBMF), approximately 3.5 to 4 miles from BIW's main shipyard. The pipefitter prefabricated pipe units that were transported by truck and installed in ships at the main BIW facility. The pipe and tin shops housed at the EBMF originally were located at the main shipyard and were moved in 1990 because more space was needed for them to operate efficiently. The work done at the EBMF was fully integrated into BIW's shipbuilding process; since 1995, the company has utilized a "just-in-time" system in which components are prefabricated in East Brunswick and delivered to Bath just before they are needed for installation in the ships.

The EBMF is one of five BIW facilities concentrated in the same area of East Brunswick. The complex of BIW buildings dominates the eastern portion of Brunswick, accounting for more acres and more employees than other land users. Other maritime businesses are located in East Brunswick, including a marina and propeller shop, but the area between the Bath shipyard and BIW's East Brunswick complex is not predominately maritime in character. Based on a review of maps, photographs and testimony, the Board reported that the area contains restaurants, motels, convenience stores, gas stations, residences and other non-maritime uses.

Although removed by several miles from the Kennebec River (which fronts the main BIW facility), the EBMF does have proximity to salt water, at least some of which indisputably is navigable. At its closest point, the EBMF property is about 1,400 feet from the navigable New Meadows River, an inlet of Casco Bay. The property also is crossed by a body of water identified as Thompson Brook by BWI and described as a tidal saltwater marsh by petitioner.

The court surveyed other circuit court positions on the meaning of "adjoining area," and concluded "without deciding, that the… functional approach is correct." The functional approach is that used by the **Ninth and Fifth Circuits**. The **First Circuit** concluded that the site failed the functional area test:

> Although the functional, "just-in-time" relationship between the two locations could hardly be stronger, the key fact is that they are quite clearly two separate locations. Even if, as the Board assumed, East Brunswick was the closest available location for relocating the pipefitting work, it cannot reasonably be viewed as an "adjoining" extension of the shipyard. Rather than sharing an "area" or neighborhood with the main facility, the EBMF is part of a second campus for the shipyard's maritime activities. This is not a matter of mileage. We could imagine a sprawling complex that spans one or more public roadways and incorporates some non-maritime uses, but still would qualify as a single continuous extension of the shore. Here, however, the shipyard and the East Brunswick complex are two separate maritime enclaves separated by a large area of mostly unrelated business and residential properties.

The court went on to state that the ALJ's implicit finding—and the Board's explicit one—that the necessary geographical connection does not exist between the EBMF and the Kennebec waterway was supported by substantial fact. The court also disapproved the argument that the functional relationship between the EBMF and the Kennebec can be supplemented by the geographic proximity of the New Meadows River, which is indisputably navigable. "The…analysis does not anticipate aggregating a facility's solely functional relationship with one waterway and its solely geographic proximity to another non-contiguous waterway."

[Topic 1.6.2 Situs—"Over land"]

[ED. Note: *The following case is noted for informational value only.**]***

Petrillo v. Lubermens Mut. Cas. Co., ___ F.3d ___ (03-2860) (**8th Cir.** August 5, 2004).

The court held that state law did not impose tort liability on a workers' compensation insurer for bad-faith failure to monitor and direct the medical treatment being furnished by the employer-insured to an injured employee. The insurer's duty was limited to paying the workers' compensation benefits to which the employee is entitled. Here the employer's chosen physician opined that the worker's hip problem was not work-related. On her own the worker continued her medical treatment, eventually undergoing three hip replacement surgeries and surgery to implant a spinal stimulator. She experienced significant hip deterioration and developed chronic regional pain syndrome. Subsequently, the carrier ordered an independent medical examination wherein another physician opined that her preexisting hip condition had been aggravated by her work injury. In finding against the employee, the court noted that state regulations

did not establish that the insurer has a duty to supervise and control an employer exercising its right to choose the medical provider.

Everitt v. Director, OWCP, (Unpublished)(Nos. 02-74232 and 02-74309)(**9th Cir.** August 10, 2004).

Here the court allowed a permanent partial disability award from one accident to run concurrently with a temporary total disability award from another injury, noting that the prior partial award compensates the claimant for the reduction in his wage-earning capacity from the first accident and the subsequent total disability award compensates the claimant for what remains of his earning capacity after that accident.

The **Ninth Circuit** also specifically rejected the **Fifth Circuit's** position that an informal conference and/or written recommendation is required for an employee to recover attorney's fees under Section 28(b). *Cf. Staftex Staffing v. Director, OWCP*, 217 F.3d 365 (**5th Cir.** July 18, 2000); re-issued at 237 F.3d 409 (**5th Cir.** July 25, 2000) (then subsequently re-issued again on March 26, 2001 using the 237 F.3d 409 Cite.)(*Held*, the plain wording of Sec. 28(b) permits claimants to obtain attorney's fees only where there has been an informal conference and a written recommendation on the disputed issue(s), and the employer refuses to accept the recommendation.).

[Topics 3.4 Coverage—Credit for Prior Awards; 70.7 Responsible Employer--Credit for Prior Awards; 28.2 Attorneys Fees—Employer's Liability]

Bath Iron Works Corp. v. Preston, ___ F.3d ___ (No. 03-2530)(**1st Cir.** August 30, 2004).

This case includes a thorough discussion of the Section 20(a) presumption in reference to the aggravation rule. The claimant suffered from a hereditary neurological disorder called paramyoclonus multiplex, which caused involuntary shaking of his head and arms. The involuntary shaking tended to become worse when he was under stress, and then subsided when the stress subsided. The claimant had alleged that harassment in the workplace aggravated the symptoms of his previously existing neurological condition. Specifically, he was ridiculed, called derogatory names, and subjected to practical jokes because of the symptoms of his disease. Members of his crew referred to him as "Shake and Bake" and would sometimes try to startle him so that his shaking would become more pronounced. This harassment caused stress, which in turn exacerbated his symptoms, causing a harmful cycle with the worker taking time off to get his symptoms under control.

The decision also addresses the Section 12 notice requirement and found that the claimant's failure to give formal notice had been excused pursuant to Section 12(d) since the employer had actual knowledge.

In addressing the average weekly wage issue, the court approved of the use of Section 10(c) partly because the ALJ accounted for the fact that the claimant's condition, aggravated or otherwise, might limit his ability to consistently perform a full week of work.

[Topics 2.2.6 Definitions—Aggravation/Combination; 2.2.9 Course of Employment; 2.2.18 Representative Injuries/Diseases--paramyoclonus multiplex; 10.4 Average Weekly Wage--Section 10(c); 12.4 Notice of Injury or Death--Section 12(d) Defenses; 20.2.1 Presumptions—Prima Facie Case; 20.3 Employer Has Burden of Rebutal With Substantial Evidence; 20.3.1 Failure to Rebut; 20.5.1 Application of Section 20(a)—Causal Relationship of Injury to Employment]

Stevedoring Services of America v. Price, ___ F.3d ___ (Nos. 02-71207 and 02-71578)(**9th Cir.** 2004)(Amended Aug. 27, 2004).

The original circuit court opinion was rendered in this matter on May 11, 2004. [See May-June 2004 Digest] Here the **Ninth Circuit** denied a motion for a rehearing, as well as a motion for a rehearing *en banc*. It also made some explanatory amendments to the May decision. The earlier holding remains in force. When a claimant's earnings have increased between the time of a prior permanent partial disability and subsequent permanent total disability, the worker is permitted to retain the full amount of both awards. The **Ninth Circuit** does not considered this to be a double recovery if the worker's increase in earnings is not caused by a change in wage-earning capacity.

[Topics 6.2.1 Commencement of Compensation—Maximum Compensation for Disability and Death Benefits; 10.2.4 Determination of Pay—Section 10(a)—"Substantially the Whole of the Year"]

[ED. Note:** This District of Columbia Workers' Compensation Act case is included for informational purposes only.**]

Orius Telecommunications, Inc. v. Sellers, ___ F.3d ___ (No. 03-AA-390)(**D.C. Cir.** August 5, 2004).

After noting Benefits Review Board case law as persuasive authority, the **District of Columbia Circuit** held that compensation must be paid (received) within 10 days of when it is due. The court refused to endorse the "mailbox rule." Additionally the court found that the employer/carrier's due process rights were not violated because their attorney rather than the company received the compensation order.

[Topic 14.4 Payment of Compensation—Compensation Paid Under Award]

B. Federal district courts

Hernandez v. Todd Shipyards Corp. (Unreported)(No. Civ. A. 04-1629)(E.D. La. July 8, 2004).

At issue here was whether an action should be remanded to state court because of a lack of federal question. Originally the widow filed an action in Orleans Parish Civil District Court alleging only state court claims against her husband's former employers and other defendants arising from her husband's on-the-job exposure to asbestos and his death from malignant mesothelioma. The Defendants removed the action asserting that the plaintiff's state law claims were preempted by the LHWCA. The defendants asserted that the LHWCA was the plaintiff's sole and exclusive remedy and that the district court had original federal question jurisdiction pursuant to 28 U.S.C. § 1331 and, therefore, that the action was removable pursuant to 28 U.S.C. § 1441.

Notwithstanding circuit precedent holding that the LHWCA "does not create federal subject matter jurisdiction supporting removal," *Garcia v. Amfels, Inc,* 254 F.3d 585, 588 (**5th Cir.** 2001); *see also Aaron v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa*., 876 F.2d 1157 (**5th Cir.** 1989), defendants argue that the analysis used in those cases was "expressly overruled" by the United States Supreme Court in *Beneficial Nat'l Bank v. Anderson*, 539 **U.S.** 1 (2003), and "abandoned" by the **Fifth Circuit** in *Hoskins v. Bekins Van Lines*, 343 F.3d 769 (**5th Cir.** 2003).

Here, the court stated that "In *Hoskins*, the **Fifth Circuit** explained the effect of the *Beneficial* decision as follows: (1) the statute contains a civil enforcement provision that creates a cause of action that both replaces and protects the analogous area of state law; (2) there is a specific jurisdictional grant to the federal courts for enforcement of the right; and (3) *there is a clear Congressional intent that claims brought under the federal law be removable*." (Emphasis supplied by the **Fifth Circuit**.) The district court noted that the circuit court concluded, "We view Beneficial as evidencing a shift in focus from Congress's intent that the claim be removable, to Congress's intent that the federal action be *exclusive*." (Emphasis supplied by the **Fifth Circuit**.) The district court concluded, "Accordingly, because the LHWCA has been raised as a defense to plaintiff's state law causes of action and because defendants cannot demonstrate that the LHWCA satisfies the **Fifth Circuit's** three-prong complete preemption analysis as modified in *Hoskins*, this Court does not have subject matter jurisdiction over this action."

[Topics 1.1 Jurisdiction—Generally; 1.1.1 Standing to File a Claim]

Lively v. Diamond Offshore Drilling, Inc., (Unpublished)(No. Civ. A. 03-1989)(E.D. La. August 3, 2004).

At issue here was whether, under the OCSLA, general maritime law or Louisiana law would apply. (Louisiana law prohibits enforcement of an indemnity provision pursuant to the Louisiana Oilfield Anti-Indemnity Act ("LOAIA"). In addressing

whether state law would apply as surrogate law, the court reviewed the law of the Fifth circuit to determine if federal maritime law applied of its own force in this case. Noting that circuit law indicates that a contract to furnish labor to work on special purpose vessels to service oil wells is a maritime contract, the district court concluded that the worker's duties were in furtherance of the vessel's primary purpose and that the agreement was maritime. Thus federal law and not Louisiana law governed.

The court next held that Section 905(c) and not 905(b) governed since the worker was a non-seaman engaged in drilling operations on the OCS. (As a non-seaman engaged in drilling operations on the OCS, the worker is subject to the exclusive remedy of the LHWCA by virtue of 43 U.S.C. § 1333(b) of the OCSLA, rather than 33 U.S.C. § 901, et. seq. When the LHWCA is applicable by virtue of Section 1333(b), the third-party remedy against the vessel owner is governed by Section 905(c).) Under Section 905(c) "any reciprocal indemnity provision" between the vessel and the employer is enforceable.

[Topics 60.3.1 OCSLA—Applicability of the LHWCA; 60.3.4 OCSLA v. Admiralty v. State Jurisdiction]

[ED. NOTE: *The following case is included for informational value only.**]***

Petition of RJF International Corp. for Exoneration from or Limitation of Liability, Civil and Maritime, (Unpublished)(C.A. No. 01-588S)(D.C. R.I. Aug. 2004).

A yacht liability insurance policy is the primary payer for medical bills for a seaman. Under the Medicare secondary payer provisions of the Omnibus Budget Reconciliation Act of 1980, the responsibility of the seaman's "maintenance and cure" can not be shifted to Medicare. *Cf. Moran Towing & Transp. Co. v. Lombas*, 58 F.3d 24 (**2d Cir.** 1995)(*Held*, injured seaman's eligibility for free medical treatment under Medicare satisfies a vessel owner's obligation to furnish cure.).

C. Benefits Review Board

Hitt v. Newport News Shipbuilding & Dry Dock Co., ___ BRBS ___ (BRB No. 03-0711)(July 7, 2004).

Overturning the ALJ, the Board found that when determining the validity of a notice of controversion, the document must be examined on its face. "[T]he information required and provided in the four corners of the document, standing alone, determined the validity of the filing…. Resort to other documents in order to divine employer's true intentions unnecessarily clouds the inquiry into employer's liability for a Section 14(e) assessment. Compliance with Section 14(d) in a timely manner is all that the statute requires of employer in order to avoid an additional 10 percent assessment." The Board held that as the employer filed a notice of controversion stating the reason for its controverting the claim, the employer complied with the requirements of Section 14(d).

Noting the employer had tried to persuade the claimant to enter into a settlement on the same day that it controverted the claim, and for the degree of disability for which it was controverting the claim, the ALJ had concluded that the employer obviously did not dispute the extent of the claimant's impairment and controverted the claim only as a pretext to avoid the claimant's right to seek modification absent the issuance of an order.

The Board noted that this matter occurred within the jurisdiction of the **Fourth Circuit** and that that court has stated that the validity of a motion for modification must come from the content and context of the [request for modification] itself… in order to ascertain whether the motion expresses an actual intent to seek compensation for a particular loss. The Board further noted that within the **Fourth Circuit**, the Board has held that consideration must be given to the circumstances surrounding the filing of a motion for modification, as well as to the content of the actual filing itself, in order to establish whether a valid motion for modification has been filed. However, the Board declined to extent this line of cases and require an ALJ to look beyond the four corners of a notice of controversion under Section 14(d) in order to determine its validity.

[Topic 14.2.1 Contoversion—Notice of Controversion]

Carroll v. M.Cutter Co., ___ BRBS ___ (BRB Nos. 03-0189 and 03-0189A) (*En banc*)(July 8, 2004), *deny'g recon. of* 37 BRBS 134 (2003).

The Board, en banc, upheld its previous panel decision wherein it found that under Section 7(a) an employer must pay for supervision of a claimant totaling 24 hours per day; family members need not assume some responsibility without pay for watching a claimant for portions of the day when they would be with him anyway. "Once the [ALJ] credited the undisputed evidence that as a result of his work injury claimant needs 24-hour care provided in part by professionals and in part by non-professionals, Section 7 established employer's liability for all of the required care." Section 7(a) bases the extent of liability exclusively on a determination of the care necessitated by the injury. "As the medical experts all agreed that claimant needs 24-hour supervision, the only legal conclusion that may be reached is that employer is fully liable for the prescribed 24-hour care pursuant to Section 7."

[Topic 7.3.1 Medical Treatment Provided By Employer—Necessary Treatment; 7.3.2 Treatment Required by Injury; 7.3.7 Attendants]

Carpenter v. California United Terminals, ___ BRBS ___ (BRB Nos. 03-0213 and 03-0213A) (July 15, 2004), *grant'g and partly deny'g recon of* 37 BRBS 149 (2003).

This matter involves whether a second employer is entitled to a credit when a claimant first sustains a permanent partial disability while working for a first employer and then sustains a permanent total disability while working for the second employer. In

this case, within the jurisdiction of the **Ninth Circuit**, the Board cited to *Stevedoring Services of Americ v. Price*, 366 F.3d 1045, 38 BRBS ___ (CRT)((9th Cir. 2004), *rev'g in pert. part* 36 BRBS 56 (2002) as being dispositive. In *Price*, the **Ninth Circuit** held that when an increase in an employee's average weekly wage between the time of a prior permanent partial disability and subsequent permanent total disability is not caused by a change in his wage-earning capacity, permitting him to retain the full amount of both awards does not result in any "double dipping."

In the instant case, the ALJ had determined, as recognized by the Board, "that there was no increase, but rather a decrease, in claimant's income between the first and second injuries, and that the combination of the amounts between the first and second injuries, and that the combination of the amounts awarded in permanent partial and total disability benefits did not exceed two-thirds of claimant's average weekly wage at the time of [the second injury]. The Board affirmed the ALJ's finding that the instant case presented no danger of "double dipping," and his consequent determination that the claimant was entitled to receive concurrent awards of permanent partial and total disability benefits for purposes of Section 8(a).

The Board further noted that the **Ninth Circuit** additionally held in *Price* that Section 6(b)(1) delineates the maximum compensation that an employee may receive from each disability award, rather than from all awards combined. In this regard, the **Ninth Circuit** reversed the Board's holding that the combined amount of the awards could not exceed the maximum compensation rate under Section 6(b)(1) is consistent with the plain language of the LHWCA. The **Ninth Circuit's** decision in *Price* thus rejects the Board's interpretation of Section 6(b)(1). The Board concluded that as the present case arises in the **Ninth Circuit**, the court's opinion was controlling.

In the Board's first opinion in this matter, the Board reversed the ALJ's finding that the statutory maximum of Section 6(b)(1) is inapplicable and held that claimant's total award of benefits was limited to this applicable maximum. The Board then held, based on the reversal of the ALJ's aforementioned determination, that "[s]ince claimant is limited to the maximum award permissible under Section 6(b)(1), [the second employer] is entitled to a credit for permanent partial disability benefits paid by [the first employer.]" Now the Board finds that, pursuant to *Price*, "we vacate our prior decision regarding Section 6(b)(1) and reinstate the ALJ's holding that Section 6(b)(1) is inapplicable to the combined concurrent awards, there can be no credit due to [the first employer] for any payments made by [the second employer].

[Topic 6.2.1 Commencement of Compensation—Maximum Compensation for Disability and Death Benefits; 3.4 Coverage—Credit for Prior Awards; 70.7 Responsible Employer--Credit for Prior Awards]

Briskie v. Weeks Marine, Inc., ___ BRBS ___ (BRB No. 03-0796)(August 25, 2004).

The Board held that, pursuant to 20 C.F.R. §702.285(a), in order for an employer to require the claimant to submit an earnings report pursuant to Section 8(j), the employer or the Special Fund must be paying compensation to the claimant, either voluntarily or pursuant to an award, at the time the request for information is made. If the employer or the special fund is not paying compensation, the forfeiture provision of Section 8(j) cannot be applied to a claimant who fails to respond timely or accurately to the information request. The Board went on to hold that by the explicit terms of the regulation at Section 702.285(a), the claimant was not a "disabled employee" who was legally obligated to comply with the employer's request or risk forfeiting his benefits under the LHWCA.

In reaching its decision, the Board had noted that where the statute contains a "somewhat ambiguous phrase, 'disabled employee,' the agency's interpretation of the statute through a regulation must be 'given controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to the statute.'" To this end, the Board noted that, "The legislative history of Section 8(j) explains that congress intended to limit the reporting obligation and the forfeiture penalty to employees who are receiving compensation concurrently with the request for earning information." *Slip opin. at* 7 citing H.R. Rep. No. 98-570(I) at 18 (1984) reprinted in 1984 U.S.C.C.A.N. at 2751. *See also* H. Conf. Rept. No. 1027, 98th cong., 2d See. (1984), reprinted in 1984 U.S.C.C.N. at 2783.

The Board also noted that where a claim is being adjudicated, an employer has the means to obtain wage information through the discovery process. 33 U.S.C. § 927(a); *see Maine v. Bray-Hamilton Stevedore Co.*, 18 BRBS 129 (1986).

[Topic 8.12.1 Obligation To Report Work--Generally]

D. ALJ Decisions and Orders

Davis v. Avondale Industries, Inc., (1996-LHC-2209)(July 19, 2004).

In this Decision and Order on Remand Awarding Attorney's Fees the **Fifth Circuit** remanded the matter for the ALJ to further analyze and quantify to what extent the claimant's attorney had secured something of value for his client in winning her right to future medical benefits. Claimant's counsel asserted that the value of the award should be measured based on the claimant's psychiatric prognosis and course of treatment at the time of the hearing. The employer contended that that the claimant's actual psychiatric care after the award was made should control. (Claimant never claimed any medical expenses for psychiatric care after her award.)

The ALJ found that holding that the amount of an attorney's fee is contingent on post-award actions and events would lead to absurd and chaotic results. "The livelihood of a claimant's attorney would be fixed to the fortune and decisions of his or her claimant. For instance, the premature death of a claimant, due to an event unrelated to

his or her claim, surely should not affect how much the claimant's attorney is paid for securing a prior award of future medical care. Likewise, attorney's earnings should not be affected by how regularly their claimants keep doctors' appointments after the hearing. Instead, the proper evaluation for determining the value of an award for future medical care is consideration of the treatment that will be required by the claimant in the future and the cost of such treatment."

Citing *Fortier v. Bath Iron Works Corp.*, 15 BRBS 261 (1982)(Deputy commissioner does not have the power to modify an attorney's fee award where the deputy commissioner determined pursuant to Section 22 that the compensation award must be increased, decreased, or terminated. Board reasoned that attorney's fee for an original compensation award rationally could not be reduced some years later merely because the claimant's physical condition became improved.), the ALJ found that the quantification of the claimant's future psychiatric care award must be made based on her psychiatric prognosis and course of treatment at the time of the hearing.

[Topic 28.2.4 Attorney fees—Additional Compensation; 28.5 Amount of Award—Sufficient Explanation; 28.6 Factors Considered in Award]

II. Black Lung Benefits Act

A. United States Supreme Court

Petitions for *certiorari* have been filed in two black lung cases. In *Coleman v. Director, OWCP*, ___ F.3d __ (___ Cir. _____), the Department argues that *certiorari* be denied because the court of appeals correctly upheld an ALJ's dismissal of a survivor's second duplicate claim under 20 C.F.R. § 725.309. The petitioning survivor counters that she was deprived of her constitutional due process rights because she did not receive adequate notice of the reason for denial of her previous claims by the district director.

The Department also takes that position that *certiorari* be denied in *Gollie v. Elkay Mining Co.*, ____ F.3d ___ (4th Cir. _____) because the circuit court correctly held that the petitioning survivor failed to invoke the irrebuttable presumption at 20 C.F.R. § 718.304 by submitting autopsy evidence that did not establish lesions which, if diagnosed by chest x-ray, would have measured greater than one centimeter in diameter.

B. Circuit Courts of Appeals

In *Energy West Mining Co. v. Director, OWCP [Jones]*, Case No. 03-9575 (10th Cir. July 9, 2004) (unpub.), the court held that the ALJ committed harmless error in a survivor's claim when he did not "explicitly weigh the medical reports of physicians who examined the miner during his lifetime . . . because other evidence relied upon by the ALJ was largely based upon the miner's autopsy records and slides, which are more

reliable because they allow for more complete examination of the lungs." In this vein, the court cited with approval to *Terlip v. Director, OWCP*, 8 B.L.R. 1-363 (1985) holding that an ALJ's deference to autopsy evidence over X-ray evidence was reasonable because "autopsy evidence is the most reliable evidence of the existence of pneumoconiosis."

[**weighing medical opinion evidence**]

In *Bethenergy Mines, Inc. v. Cunningham*, Case No. 03-1561 (4th Cir. July 20, 2004) (unpub.), the court held that it was proper for the ALJ to accord greater weight to the x-ray interpretation of a dually-qualified reader (board-certified radiologist and B-reader) over the interpretation of a physician who was only a B-reader.

The court further held that Employer waived its argument that the miner's claim was barred by the three year statute of limitations because Employer "stipulated at the first hearing before the ALJ that Cunningham's claim was timely." Notably, however, the court did not automatically conclude that the statute of limitations does not apply to subsequent claims filed under 20 C.F.R. § 725.309. *Compare Andryka v. Rochester & Pittsburgh Coal Co.*, 14 B.L.R. 1-34 (1990).

[**weighing chest x-ray evidence; three year statute of limitations**]

C. United States District Court

In *Nowlin v. Eastern Associated Coal Corp.*, ___ F.Supp.2d ___, Case No. CIV.A.1:02 CV 51 (N.D. W.Va. Aug. 12, 2004), the court held that a widow was entitled to a 20 percent penalty on unpaid benefits from Employer, despite the fact that she received timely payments of benefits from the Black Lung Disability Trust Fund.

[**penalty awarded on past due benefits**]